

SOUTH AFRICA / JUDGMENT

Body Corporate of Windsor v Mount Amanzi Shareblock Limited (12240/2015) [2016] ZAGPPHC 595 (12 April 2016)

[2016] ZAGPPHC 595

COURT

North Gauteng High Court, Pretoria

BEFORE

N N Mavundla

CASE / FILE NUMBER

12240/2015

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IN

THE NORTH GAUTENG HIGH COURT

[REPUBLIC

OF SOUTH AFRICA]

DATE:

12 APRIL 2016

CASE

NUMBER: 12240/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

In

the matter between:

THE
BODY CORPORATE OF WINDSOR
HEIGHTS
SECTIONAL TITLE SCHEME
.....FIRST
APPLICANT
SKY
AFRICA PROPERTI ES 24
CC.....SECOND
APPLICANT
WALTER
SZEZINSKI.....THIRD
APPLICANT
WALTER
SZEZINSKI
.....FOURTH
APPLICANT
IRFAAN
KHOTA
.....FIFTH
APPLICANT
NICOVANECK.....SIXTHAPPLICANT

WILHELMINA
VAN
ECK.....SEVENTH
APPLICANT
INA
VAN
STADEN.....EIGHT
APPLICANT
THEUNS
F DREYER
.....NINTH
APPLICANT
DINA
SCHOEMAN.....TENTH
APPLICANT
ALBERTUS
SCHOEMAN.....ELEVENTH
APPLICANT
GINA
JACOBS.....
TWELFTH APPLICANT
GIDEONJACOBS.....THIRTEENTH.APPLICANT
MARIUS
PRETORIUS.....FOURTHEENT
APPLICANT
MELISSA
PRETORIUS.....FIFTEENTH
APPLICANT

ERIC
 RYCROFT.....SIXTEENTH
 APPLICANT
 ISOBEL
 RYCROFT.....SEVENTEENTH
 APPLICANT
 LIANIE.SCHNAAR-CAMPBELL..N..0.....EIGHTEENTH
 APPLICANT
 EDWARD
 AUCAMP.....NINETEENTH
 APPLICANT
 CLIVE
 GOMEZ.....TWENTIETH
 APPLICANT
 LIZEL
 GOMEZ.....TWENTY
 FIRST APPLICANT
 MARY
 ANNE VAN DER WESTHUIZEN.....
 TWENTYSECOND APPLICANT
 FRED
 TRENTELMAN.....TWENTY
 THIRD APPLICANT
 JACO
 SWART
 TWENTY.....FOURTH
 APPLICANT
 JACO
 SWART
 TWENTY.....FIFTH
 APPLICANT
 And
 MOUNT
 AMANZI SHAREBLOCK LIMITED
RESPONDENT

JUDGMENT

MAVUNDLA J;

[1] The applicant is the Body Corporate of Windsor Heights Sectional Title Scheme, situated on Portion [2... of Portion 1...,

Hartbeesfontein 4...], as provided for in s16 of the Sectional Titles Act No 95 of 1986 ("the Sectional Titles Act"). The second to twenty fifth applicants are owners of units and occupiers of units within the sectional title scheme's property. The scheme property is not owned by the first respondent, but by the individual owners jointly. The body corporate is established for each sectional title scheme and, as per the provisions of s36 (4) of the Act. The body corporate is responsible for enforcement of the Rules and the control, administration and management of

the communal property.

[2] The applicants seek an order in terms of which the respondent is ordered:

to forthwith restore the applicant's' unrestricted access to the Windsor Heights Sectional Scheme property ("scheme property")

being [Portion 2.. of Portion 1..., Hartbeesfontein]; to forthwith restore the applicants' unrestricted use of the access road to tho scheme property, which leads through the respondent's property; to restore the applicants' unrestricted access to the respondent's property; That pending the final determination of the dispute between the applicants and the respondent in respect of the levies charged by the respondent, the respondent:

2.4.1 be ordered to grant the applicants full access to the respondent's facilities;

2.4.2 be interdicted and restrained from interfering with and or limiting in any way whatsoever, the use and enjoyment of the aforesaid

facilities by the applicant;

2.4.3 be interdicted and restrained from interfering with and or interrupting the applicants'

(i) access to the scheme property;

(ii) water supply;

(iii) any other services provided to the applicants by the respondent.

[3] The respondent is opposing the application and has counterclaimed in terms of Rule 6(7) seeking an order in terms of s21(c) of the Supreme Court Act No 10 of 2013, declaring the first applicant, the Body Corporate of Windsor Heights Sectional Title Scheme, liable to the respondent for the levies charged by the respondent in terms of notarial servitude No K8235/1996 calculated as 7.6% of the total of such expenses incurred by the respondent for:

3.1 security services;

3.2 sewerage services and refuse removal;

3.3 staff salaries for operational staff employed in the running of the respondent's facilities;

3.4 maintenance of gardens and grounds of Windsor Heights;

3.5 electricity consumption on the common area of Windsor Heights and the respondent;

3.6 telephone expenses in respect of the operations of the facilities of the respondent; and

3.7 the costs of the front office and reception of the respondent's facilities;

3.8 Payment of R40 280.per month for 12 months from 1 October 2014;

3.9 Interest on each of the monthly payments from the day of the month on which each payment fell due at the statutory prescribed rate of interest to date of payment, and

3.10 a costs order against the applicants jointly and severally the one paying the other to be absolved; and

3.11 further or alternative relief.

[4] The main application is in essence one of spoliation allegedly committed by the respondent. The spoliation complained of in casu, is not the classical dispossession of corporeal commodities in the physical possession of the despoiled, but one of quasi- possessory

rights, namely access to use of certain facilities owned by the respondent, to which by agreement the applicants are entitled to.[1] The means of deprivation is allegedly in the form of the unilateral increment of levies by the

respondent.

[5] In the matter of ATM Solutions (Pty) Ltd v Olkru Handelaars CC[2] the Supreme Court of Appeal held that:

"[9] The cases where quasi-possession has been protected by a spoliation order have almost invariably dealt with rights to use property (for example, servitudes or the purported exercise of servitudes-'gebruiksregte') or an incident of possession or control of the property. The law in this regard was recently succinctly stated in First Rand Ltd v Scholtz N0[3] where Malan AJA pointed out that spoliation order-

'does not have a "catch-all function" to protect the quasi-possession of all kinds of rights irrespective of their nature.

In cases ... where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi- possession of certain rights. It follows that the nature of the professed right,

even if it need not be proved, must be determined or the right characterized to establish whether its quasi possessio is deserving of protection by the mandament.[4]'

Mere personal rights are not protected by the mandament. Thus only rights to use or occupy property, or incidents of occupation, will warrant a spoliation order."

[6] The respondent denies that there was any spoliation, contending that it has a right in its own discretion to increase the levies. It has also counterclaimed seeking the court in terms of s21 of the Supreme Court Act to declare the increment of the levies to be reasonable and that they were per agreement between the parties, and therefore enforceable.

[7] The first applicant is a Body Corporate Windsor Heights Sectional Title Scheme established in terms of the provisions of section 36(1)

- (c) of the Sectional Titles Act No 95 of 1986 ("the Sectional Titles Act"), and is instituting the application in its name, joined by owners of units and occupiers of units within the scheme.
- [8] The scheme is situated on Portion [2..]'84, Hartbeesfontein 445 -JQ ("the scheme property"). In terms of s16 of the Sectional Titles Act, Act 95 of 1986 ("the Act") a sectional titles scheme property is owned by owners of sections jointly in undivided shares proportionate to the quotas of their respective sections as specified on the relevant sectional plan. The scheme property is, therefore, not owned by the body corporate but by the individual owners ('the owners') jointly. The body corporate is responsible for the enforcement of the Rules and control, administration and management of the common property.
- [9] The relevant scheme property is an island, land-locked within the boundaries of a RCI Holiday Resort conducted by the respondent.

Access to the scheme property is gained via an access road that traverses the respondent's property. It is common cause that there is servitude of right of way registered against the property of the respondent in favour of the scheme property. The access road is situated within the boundaries of the servitude. A notarial deed of servitude was registered over all the subdivisions of portion 42 in respect of, inter alia:

9.1 the provision of water, sewerage services, rubbish removal and security services by the respondent. The owners and or occupiers of the scheme property pay a monthly levy to the respondent for the aforesaid services; and

9.2 The owners, their tenants and or guest are, further, entitled to use the respondent's facilities, against against payment of levy.

- [10] It is common cause that the respondent has a right to unilaterally raise the levy tariffs, which he did as from October 2013. It is also common cause that a dispute has arisen between the applicants and the respondent over the levy increase. This resulted in the respondent denying the applicants access to the shop and restaurants on the respondent's property. The respondent restricts access to the scheme property via measures it implemented at the entrance gate to the respondent's property. Prior thereto the applicants and their guests had free access through the respondent's only main gate, from which a road to the scheme property traverses through the respondent's property. I propose not to traverse all the relevant issues germane in this matter.
- [11] It is common cause that the applicants' property i.e. the scheme" is like an island, landlocked within the property of the respondent. It is accessible through the main gate of the respondent, with a road traversing through the respondent's property. It is common cause that Portion 42 was subdivided and certain portions thereof, subsequently sold to De Wildt by the respondent. The sub-division of Portion 42 and the development of sectional title scheme on the (sub-divided) portions were made conditional upon the sub-divided properties to be notarial tied.

[12] It is common cause that a notarial deed of servitude was registered to give effect to the conditions attached to the sub-division of Portion 42 and establishment of the sectional title development and subsequent agreement concluded between the respondent and De Wildt. It is not in dispute that the servitude provides for a discretionary determination of the levy and the extent thereof. It is stipulated in the servitude that the respondent is entitled to determine the levy in its sole

discretion. [5]

[13] Although the property owned by the respondent is defined as the dominant property and all other sub-divisions, including the scheme's property, are defined as the servient properties. However, it appears from the servitudes that:

13.1 Not all rights are granted to the respondent, inter alia, a right of way is granted in favour of the scheme over the property of the respondent. The same applies in respect of the reciprocal access to the relevant properties;

13.2 Some servitudes, like the right of way and access, are passive in nature, e.g. all that is required is that use of the properties is noted. Other servitudes, e.g. water and provision of services, use of the facilities and irrigation servitude (included under general conditions) impose an obligation on the scheme to pay for levies as counter performance.

[14] The respondent's right to raise levies is derived from a contract which was concluded between the respondent and De-Wildt, which agreement the applicants were not party to. The fact that the applicants were not a party to the agreement between the respondent

and De Wild is neither here or there. This is so because the respondent's right to raise the levies was registered in the servitude agreement, thus converting the personal right of the respondent into a real right. The consequences thereof are that the applicants are bound to recognise and respect this right.

[15] In as much as the respondent has the right to increase the levies in its sole discretion, that does not accord the respondent to mero motu, deny the applicants access to its property and the enjoyment of the facilities they were entitled to merely because of their failure to pay the levies.

[16] In the matter of *Stocks Housing v Department of Education and Culture Services*[6] the Court held that: "An applicant seeking a spoliation order must satisfy the Court upon a preponderance of probability that it was in possession of the property and that the respondent unlawfully deprived it of that possession. The mandament van spolie is a long established possessory remedy. To the extent that the well-recognised requirements for its being granted require authority, see *Nienaber v Stuckey* 1946 AD 1049 at 1053-4."

[17] In casu, it is common cause that the applicants had access to the respondent's property and facilities. It is also common cause that respondent has since raised its levies and thereby restricted the aforesaid access subject to payment of the increased levies. It is common

cause that there is a dispute between the parties in respect of the increased levies. Absent an agreement between the parties, the implementation of the levies is, in my view, tantamount to despoiling the applicant's right to access to the facilities. In the matter of *Zulu v Minister of Works, KwaZulu, and Others* [7] the Court held that the despoiled is entitled to restoration, without the court having to interrogate any dispute regarding the items forming subject of spoliation.

[18] I am of the view that, in circumstances where, as in *casu*, the applicants do not pay the levies, the respondent cannot without much ado; deny them access to the facilities over which there is a servitudal right, to coerce payment of the levies, without a court order, otherwise its action amounts to spoliation. I am therefore satisfied that the applicants have demonstrated that they were in peaceful exercise of their right to access the property and facilities of the respondent and accordingly entitled to the relief sought. They are also entitled to the interim relief that the respondent be interdicted pending final adjudication of the dispute pertaining to the levies.

[19] In so far as the respondent's counterclaim is concerned, in my view, it stands to be dismissed with costs for the reasons that follow:

It is trite in motion proceedings, where there is a dispute of fact the Court has discretion to either refer the matter to oral evidence or dismiss the application. In the matter of *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd*[8] the Appellate Court held that:

"A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed, he chooses that procedural form at his peril, for the Court, in the exercise of its discretion, might decide neither to refer the matter to trial nor direct that oral evidence on the disputed facts be adduced before it, but to dismiss the application. *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 19 49 (3) SA 1155 {T} at 1168. But if, notwithstanding that there are disputes on the papers before it, the Court is satisfied that on the facts stated

by the respondent, together with the admitted facts in the applicant's affidavits, the applicant is entitled to relief {whether

in respect of all his claims or one or more of them) it will make an order giving effect to such finding with an appropriate order as to costs. (Cf *Stellenbosch Farmers' Winery Ltd v Stelenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235; *Burnkloof Caters (Pty) Ltd v Horseshoes Caters (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938.) The Court does not exercise discretion in motion proceedings whether or not to grant claims established by admitted or undisputed facts; except perhaps in very extraordinary circumstances the applicant has a right to an order in respect of such established claims. (*Room Hire case* at 1166)".

[20] As already pointed out herein above, the respondent has a right to *mero motu* determined the levy and or increase thereof in its own discretion? It is trite where an agreement contains a clause entitling one of the parties to determine or increase rental, interest or

levies, at its own discretion, such discretion must be exercised *arbitrio bani viri*. This means that the discretion must be exercised reasonably. The increase must be reasonably applied, the increase must be reasonable, and the other party to be affected by such increase, must be informed and invited to object or agree in such intended increase; vide *Jugal NO v Shoprite Checkers t/ a OFK Franchise Division*[9]; *ABSA BANK Ltd v Lombard*.[10] *Blake and Another v Cassim and Another NNO* [11]

In casu, as already stated herein above, the respondent has a right to determine in its discretion the levies, which right flows from the

agreement concluded between the respondent and De-Wildt.

[21] According to the respondent, it exercised its discretion *arbitrio bani viri* in determining the increase of levies. This is disputed by the applicants. In my view, the dispute cannot be resolved on the affidavits as they are. I am disinclined to refer the matter to oral evidence. The respondent certainly must or ought to have appreciated from the correspondence that flew between the parties around the issue of levies, that there is certainly going to be a dispute of facts and in its own peril chose to follow the course it did. In the premises the counterclaim stands to be dismissed with costs.

[22] In the premises the following order is issued:

1. That the respondent is ordered to:

forthwith restore the applicants' unrestricted access to the Windsor Heights Sectional Scheme property ("scheme property") being [Portion 2.. of Portion 1., Hartbeesfontein]; forthwith restore the applicants' unrestricted use of the access road to the scheme property, which road traverses the respondent's property; restore the applicants' unrestricted access to the respondent's property;

2. That pending the final determination of the dispute between the applicants and the respondent in respect of the levies charged by the respondent, the respondent:

be and is ordered to grant the applicants full access to the respondent's facilities;

2.1 be and is interdicted and restrained from interfering with and or limiting in any way whatsoever, the use and enjoyment of the

aforesaid facilities by the applicant;

2. 3 be and is interdicted and restrained from interfering with and or interrupting the applicants':

3. That the counterclaim is dismissed.

That the respondent pays the applicants' taxed or agreed costs of the main application and the counterclaim.

N.N.MAVUNDLA

Date of Hearing: 14/ 03 I 2016; Date of Judgment 12/ 04 I 2016

APPLICANTS' ADVOCATE: ADV DANIEL PRINSLOO

INSTRUCTED BY..... : ELSA KRUGER AITORNEYS

RESPONDENT'S ADVOCATE..... : ADV H F JACOBS SC

INSTRUCTED BY..... : MACROBERTS INC

[1] Vide Zulu v Minister of Works, KwaZulu and Others 1992 (1) SA 181 (D & CLD) at 186F-J, 187H-188F.

[2] 2009 (4) SA 337 (SCA) at 340 l-341C.1871.

[3] 2008(2) SA 503 (SCA) at 510 B-C.

[4] See also Telkom SA Ltd v Xsinet (Pty) Ltd 2003 (5) SA 309 (SCA) at para 14; cf Impala Water Users Association v Lourens NO and Others 2008 (2) SA 495 (SCA), reported first in [2004] 2 ALL SA 476, where the court considered that rights to water in issue were not purely contractual in origin and that they were protected by mandament.

[5] Record: clause 87 and Clause E2 pages 67 and 70 of the record respectively.

[6] 1996 (4) SA 231 (CPD) at 2381-J.

[7] 1992 (1) SA 181 (D) at 187

[8] 1982 (1) SA 398 (AD) at 430G-431A.

[9] 2004 (5) SA 248 (SCA) at 261 D-E.

[10] 2005 (5) SA 350 (SCA) at 3538-C.

[11]

[2008] ZASCA 67; 2008 (5) SA 393 (SCA) at 402A-D.

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